United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1070

To Be Argued By
Stuart R. Shaw
(15 minutes)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1070

UNITED STATES OF AMERICA,

Appellee,

-against-

MAX BEER,

Defendant-Appellant.

BRIEF FOR APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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STATEMENT OF THE FACTS AND NATURE OF THIS CASE

Max Beer, appellant herein, was indicted on or about June 29, 1972 on two counts alleging violations of the drug laws of the United States and one count alleging a conspiracy to violate said laws. Appellant and his co-defendant, represented by the same counsel, both entered pleas of not guilty to the indictment on July 21, 1972. The government filed a notice of readiness for trial on August 28, 1972.

Thereafter, counsel filed several pre-trial motions on behalf of appellant. On September 22, 1972, the court adjourned appellant's motion to suppress evidence until the time of trial; it was to be heard immediately prior to the commencement of trial. On November 3, 1972, appellant's motion for a bill of particulars was heard and granted in part.

Appellant's case was not called again until May 10, 1973; at that time it was adjourned by the court for assignment of new counsel. Six months had elapsed with no action having been taken by either the government or the court towards prosecuting the case.

On May 17, 1973 new trial counsel was appointed. As counsel noted in an affirmation dated November 7, 1973 (App. C), he "discussed the case at length with (appellant's former counsel), inquiring as to

any and all work that had been done by his office with regard to the case. (The former counsel) assured me that all that was legally possible and feasible had been attempted by his firm."

On July 25, 1973, appellant withdrew his plea of not guilty and entered a plea of guilty to one count of the indictment. The plea was accepted by the court and on October 12, 1973, appellant was called for sentencing. By that time, appellant's trial counsel had become aware of the six month delay and made a motion to dismiss the indictment pursuant to Rules 4 and 5 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases.

Upon the statement of the Assistant United States Attorney that the government had always been prepared and that it was appellant's prior counsel who had caused the delays, counsel withdrew his motion (App. C). However, upon a further checking of the record, Counsel renewed the motion on November 7, 1973. He included an affidavit from appellant's prior counsel that to the best of his recollection, appellant had not requested any adjournments of the proceedings.

This post-trial motion was rejected by the trial court and no change in appellant's sentence was ordered. This appeal is taken from the denial of appellant's post-trial motion.

QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

This brief on appeal is addressed to the following question:

1. Was appellant entitled to a dismissal of his indictment because of a denial to him of his right to a speedy trial?

SUMMARY OF ARGUMENT

I. APPELLANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUNDS OF DENIAL OF HIS RIGHT TO A SPEEDY TRIAL WAS IMPROPERLY DENIED.

POINT I

APPELLANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUNDS OF DENIAL OF HIS RIGHT TO A SPEEDY TRIAL WAS IMPROPERLY DENIED

In January, 1971, the United States Court of Appeals for the Second Circuit formulated its Rules Regarding Prompt Disposition of Criminal Cases. Rule 4, which became effective six months following the date of the announcement, provided:

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or withn the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

An inspection of the docket sheets (App. A) reveals that appellant was not brought to trial for nearly thirteen months following the filing of his indictment. On its face, then, Rule 4 has been subverted. Therefore, it is necessary to determine whether "good cause" was shown to extend the six month period, pursuant to Rule 5 of the Prompt Disposition rules.*

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* Rule 5 contains eight periods of delay which are to be excluded when computing the time within which the government should be ready for trial. The text of the rule is reprinted in App. D.

The only exception applicable to appellant is paragraph (a) of Rule 5 which provides:

> (T)he following periods should be excluded:
>
> A reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are subjudice.

Appellant's trial counsel did in fact press several pre-trial motions. However, the last of these was resolved on November 3, 1972. No further action was taken to move the prosecution along until the case was next called on May 10, 1973 - an unexcusable delay of more than six months. When this issue was first brought to the court's attention at the sentence hearing on October 12, 1973, the government attorney asserted that the entire delay was occasioned by the manner in which the defense was conducted. There is no evidence to justify this assertion.

> The purpose of Rule 4 is to insure that regardless whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public losing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced. Hilbert v. Dooling, 476 F.2d 355 (2nd Cir. 1973) at 357.

The delay in the instant case would appear to be of just the sort the Court sought to avoid in promulgating the Rule 4. Further, the "use of the imperatives 'must' and 'shall' and of the word 'charge' manifest an intent not only that the dismissal be mandatory but that it have a binding effect." Hilbert, supra, at 358.

Moreover, the government cannot be heard to argue that appellant waived his objection by failing to demand his trial during the November -May delay. A defendant has no duty to bring himself to trial; the prosecution has that duty. Barker v. Wingo, 407 U.S. 514, 527, 92 S. Ct. 2182, 2190, 33 L. Ed. 2d 101 (1972).

Here, the government simply failed to go forward. Even though it had filed a notice of readiness for trial on August 28, 1972, the government apparently neglected to move the case to trial even after disposition of the pre-trial motions. Indeed, the delay might have been more prolonged had the need to assign new counsel for appellant not manifested itself.

Appellant further submits that this Court's recent decision in United States v. Cacciatore, 73-2265 (2nd Cir. 1973) in no way compels a decision here against appellants. The facts of that case are totally inapposite to the pattern of the instant case.

There, trial was set for a date approximately six weeks after the return of the indictment and less than five months after the arrest

of one of the defendants. When, before trial, the government requested a two-week adjournment, the court granted a defense motion to dismiss the indictment for lack of a speedy trial. This Court found that the trial court had abused its discretion in dismissing the indictment on those grounds after such a short period of time. In the instant case, the delay was more than six months and it came on the heels of a "permissible" (i.e., excludable from the six month rule) of delay of three months while appellant made his pre-trial motions.*

As this Court noted in its statement accompanying the Prompt Disposition rules, when the process of law enforcement "is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded." There was "no good reason" for the delay of appellant's case. In the interests of justice to the appellant and the societal interest in efficient judicial administration, his conviction must be reversed and the indictment dismissed on the basis of the denial to appellant of his right to a speedy trial.

* Any question of the timeliness of the motion to dismiss the indictment in the lower court may be explained by reason of the change in counsel for appellant and in the government's assurance on the record of no delay. See trial counsel's affirmation of November 7, 1973 (App. C) and minutes of hearing, October 12, 1973.

CONCLUSION

It is respectfully submitted, that in light of the foregoing point, appellant's conviction and sentence should be reversed and the indictment dismissed.

Respectfully submitted,

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Of Counsel

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RUTH JACKSON, being duly sworn, deposes and says that she is not a party to the action, is over 18 years of age, and resides at 233 Broadway, New York, New York 10007. On the 11th day of March, 1974, deponent served three (3) copies of defendant-appellant Max Boer's brief on appeal and three (3) copies of defendant-appellant Max Boer's appendix on appeal on Edward J. Boyd, III, United States Attorney for the Southern District of New York, attorney for the government in this action, at 225 Cadman Plaza East, Brooklyn, New York, 11201, the address designated by said attorney for that purpose, by depositing said copies in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Ruth Jackson

Sworn to, before me, this
11th day of March, 1974

Roy Alan Jacobs

ROY ALAN JACOBS
Notary Public, State of New York
No. 60-7060840
Qualified in Westchester County
Commission expires March 30, 1974